

The Constitutional Status of Women in 1787

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I am tempted to make this presentation on the constitutional status of women in 1787 extremely brief. That is, I could accurately declare that "women had no status in the Constitution of 1787" and immediately sit down to listen to the comments of the rest of the panelists here this morning. However, I was undoubtedly invited here to say more than that, and so I shall. If one looks closely at the words of the original Constitution, the term "man" or "men" is not used; rather, "person," "persons" and "people" are the words of choice. That would seem to imply that the Founding Fathers intended to include women in the scope of their document. That such an assumption is erroneous, however, was demonstrated in a famous exchange between Abigail and John Adams in 1776. Although John Adams was not present at the Constitutional Convention, his attitudes toward women were certainly representative of the men of his generation.

In March, 1776, when it had become apparent that independence would soon be declared, Abigail advised John, then serving in the Continental Congress in Philadelphia, that in the "new Code of Laws" that would have to be adopted he and his fellow legislators should "Remember the Ladies," for "all Men would be tyrants if they could."¹ What she sought was not legal equality or the vote but rather reform of the common law of marriage, which placed wives' property under their husbands' control and which made married women the legal wards of their spouses.² John treated his wife's plea with disdain, dismissing it with a jocular reference to the current prevalence of rebelliousness among dependents like children and servants, which mimicked the larger

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1. Letter from Abigail Adams to John Adams (Mar. 31, 1776), *reprinted in The Book of Abigail and John* 120-21 (Lyman Butterfield, Marc Friedlaender & Mary-Jo Kline ed. 1975).

2. See generally Marylynn Salmon, *Women and the Law of Property in Early America* (1986).

struggle against Great Britain.³ Thus the first known request that protections for women be included in the nation's fundamental laws was rejected out of hand.

There was, it might be argued, a good historical reason why John Adams and other revolutionary leaders, including those present at Philadelphia in 1787, failed to perceive women as a part of their polity. In their day, as in preceding centuries, the basic unit of society and economy was not the individual, as it is today, but rather the *household*.⁴ Each household had a male head, who controlled the household's property, directed its activities, fulfilled its obligations to the community through militia service or political participation, and was regarded by the law as the ruler of his own "little commonwealth," to use John Winthrop's words.⁵ In this type of social organization, women were not the only dependents denied a voice in running their own affairs or those of the community—servants, sons who had not yet set up their own households, and slaves also had no vote and few responsibilities to the wider community.⁶ Since married women and their daughters were legally subordinate to husbands and fathers and were perceived solely as parts of households, it is therefore hardly surprising that they were ignored by the drafters of the Constitution.

And yet for two reasons such an explanation for the omission of women from the Constitution of 1787 is ultimately unsatisfactory. First, it rests on a socio-economic base rather than a politico-constitutional one. Second, it does not ask the most interesting question: why was government in the eighteenth century defined in such a way as to wholly exclude women? Dependent sons and male servants could, after all, acquire the status, privileges, and responsibilities of household heads when or if they were able to establish households of their own. Certain male ex-slaves also achieved such standing. But women, even those who as widows assumed economic control of their households, could never take on the political functions of the head of the household. Why? To answer this intriguing question I must first briefly review developments in seventeenth-century political theory in England.

Before the English Civil War, the context of family and

3. Letter from John Adams to Abigail Adams (Apr. 14, 1776), *reprinted in The Book of Abigail and John*, *supra* note 1, at 121-23.

4. Gordon Schochet, *Patriarchalism in Political Thought* 268 (1975).

5. *Id.* at 65-66. John Winthrop described the family as a "little commonwealth" in his address, *A Declaration in Defense of an Order of Court Made in May, 1637*, *reprinted in Puritan Political Ideas 1558-1794*, at 144, 146 (Edmund Morgan ed. 1965).

6. Schochet, *supra* note 4, at 65-72.

household provided the analogies that explained society and politics to English people, including those who emigrated to the New World. As was true later, the dominant figure in the household was its male head, whom society, government, and religion alike deemed its proper ruler. It was to these *paterfamilias* that Stuart apologists like Sir Robert Filmer looked when they sought a source for claims of absolute monarchical power. By drawing an analogy between the king and the family patriarch, they hoped to buttress their theoretical position that the powers of the king were natural, absolute, and not open to question.⁷ Even persons who did not support such all-encompassing assertions of kingly authority accepted the notion that the state and the family were analogous institutions—indeed, that the state had its theoretical and perhaps even historical origins in the husband and father's power over his wife, children, and other dependents.⁸

That these ideas were carried to America by English settlers (especially the Puritans) becomes evident if one looks at John Winthrop's famous address on civil liberty in 1645.⁹ In that speech he drew parallels between the wife's role in marriage and the subject's place in a state:

The woman's own choice makes such a man her husband; yet being so chosen, he is her lord, and she is to be subject to him, yet in a way of liberty, not of bondage; and a true wife accounts her subjection her honor and freedom, and would not think her condition safe and free, but in her subjection to her husband's authority. Such is the liberty of the church under the authority of Christ, her king and husband Even so, brethren, it will be between you and your magistrates.¹⁰

But while women's place in individual families was thus clear, their position in a society structured on the familial model was less so. Seventeenth-century England was characterized by a pervasive system of inequality in which each person had a distinctive place in a hierarchy based on age, wealth, and family standing.¹¹ Yet that system was designed solely with respect to the status of adult men. Women and children, as dependents, were assumed to take the rank of their husbands and fathers.¹² The omission of gender from formal explications of the hierarchy thus made the status of women problematic. Superficially, the matter seemed simple: indi-

7. See *id.* at 99-114, 137-58.

8. *Id.* at 1-17.

9. Address by John Winthrop (May, 1645), *reprinted in Puritan Political Ideas 1558-1794*, *supra* note 5, at 136.

10. *Id.* at 139.

11. Keith Wrightson, *English Society 1580-1680*, at 17-23 (1982).

12. *Id.* at 21.

vidual women were always subject to individual men of their own rank. But high-status women took precedence over low-status men, since their husbands' rank was more important in determining their social standing than was their gender.

Furthermore, the formulation of female subjection worked well only when the women in question were filling the roles of wife or daughter, both of which were clearly subordinate to men. If the woman in question was a mother, determining her rank was considerably more complicated. The Fifth Commandment, which the English people universally cited as the fundamental source of *all* authority—governmental as well as familial—in their society,¹³ read, "Honor Thy Father and Mother." Accordingly, women acting in a maternal capacity were nearly equal to men: they could command the same obedience from children, even adult male children, that their husbands could.¹⁴

A widow was even more anomalous, for she was the most likely of all females to own property. Under the common law, only unmarried women could control their own possessions. Never-married women seldom had much property, whereas widows could inherit substantial holdings from their husbands. An independent, property-holding widow confronted familial theory with a basic contradiction in terms because she did not fit the standard definition laid down in 1632 in the first treatise on the legal status of women written in English: "All [women] are understood either married or to be married."¹⁵ If she was also a mother of high status, she would, on the one hand, rightly command the deference of her sons and low-ranking men, and on the other, be subject to no man herself.

Although a theory that saw family and state in the same terms explained women's position within particular households, it created serious difficulties when applied to their standing in society as a whole. On close examination, a formula that at first appeared comprehensive simply did not account for many aspects of women's rank, especially that of high-status widows. Indeed, it is striking how many high-status women posed problems for the authorities in England and, later, her American colonies.¹⁶

There was, however, another way of conceptualizing the nature of polity and society, one that resolved the ambiguities of wo-

13. Schochet, *supra* note 4, at 6.

14. See *id.* at 76-84.

15. The Lawes Resolutions of Womens Rights: Or, The Lawes Provision for Women 6 (1632).

16. One example is Margaret Brent of Maryland. See Julia Cherry Spruill, *Mistress Margaret Brent, Spinster*, 29 Md. Hist. Mag. 259-68 (1934).

men's status by rendering females irrelevant outside the boundaries of the household, which perhaps gained male adherents for that very reason. That theory, which had originally been formulated in ancient Greece and achieved its fullest early expression in the works of Aristotle, saw the family and the state not as analogous but as different, diametrically opposed institutions. The *polis*, composed only of men, was based on equality, while the family, composed of men and women, incorporated hierarchies of age, wealth, and gender.¹⁷ Greek and—to a certain extent—Roman political theory drew a sharp line between the family and the state. Accordingly, the place of women within the family could be conceptually separated from the position of women in the polity and the wider society. In the latter context, women's rank was determined entirely by gender, all females being excluded from active participation in decisionmaking; in the former, their rank was dependent on a combination of age, gender, and wealth, and women with high standing by those criteria could claim a share of family governance.¹⁸

In the sixteenth and seventeenth centuries, this older approach once again attracted adherents. Perhaps English men found it congenial because it expressed in theoretical terms the reality of their political lives. In counties and villages throughout the nation, the era witnessed the development of strong local institutions based on widespread male participation and government by a consensus of at least some property-owning male inhabitants.¹⁹ Still, the ideas remained inchoate until near the end of the seventeenth century, when John Locke built a new theory on the notion that men had contracted with each other to form both society and polity.²⁰ Thus he combined ancient political concepts with customary English practices to construct a comprehensive explanation for the origins of society that was to successfully challenge the then-dominant familial formula. He did so because as a supporter of the Protestant side in the Civil War and the Glorious Revolution of 1688-89 he needed to justify the overthrow of the absolutist Stuart monarchy and its replacement by a government more directly responsive to the will of the people.²¹

17. See Jean Bethke Elshtain, *Public Man, Private Woman: Women in Social and Political Thought* 45-54 (1981); Susan Moller Okin, *Women in Western Political Thought* 76-96 (1979); and Arlene Saxonhouse, *Women in the History of Political Thought* 20 (1985).

18. See Elshtain, *supra* note 17, at 46; and Saxonhouse, *supra* note 17, at 87-91.

19. Wrightson, *supra* note 11, at 35-36. Carl Bridenbaugh, *Vexed and Troubled Englishmen 1590-1642*, at 243-45 (1967).

20. See John Locke, *Two Treatises of Government* (Peter Laslett ed. 1960).

21. See Schochet, *supra* note 4, at 192-93.

What Locke did, in short, was to abandon the unified worldview that had characterized familial political theory. He instead divided the world conceptually into the all-male "public" realm of politics and government, in which equality was the norm, and the "private" realm of family life, in which hierarchy was retained.²²

Women played a prominent role in the dialogue between supporters of the two theories. John Locke attacked Sir Robert Filmer, whose *Patriarcha*²³ presented the classic defense of the family analogy, for omitting mothers as wielders of familial power. How could Filmer, he asked, base a grant of absolute political authority on paternal power alone, when the Fifth Commandment linked mothers and fathers?²⁴ Yet Locke too was vulnerable with respect to the logic of his treatment of women. How could Locke, asked his opponents, presume that husbands and fathers represented their wives and children when they consented to the establishment of political and social authority? Did not the notion of consent require the participation of all free adults, even if not of all members of society?²⁵

Locke dealt with that contention by stressing the inherent inequality of women. The great philosopher, celebrated in his own day and ours as the man who attempted to remove "natural" constraints from men and emphasized environmental influences over inherited disabilities, did not question wives' necessary subordination to their husbands. Locke asserted that "the first Society was between Man and Wife," and that it was based on a "voluntary Compact," with "mutual Support, and Assistance."²⁶ But, he noted, although a husband and wife have "one common Concern," they have "different understandings," and so equality was not appropriate in a marriage.²⁷ He concluded that, even though the power of the husband was limited, "it therefore being necessary, that the last Determination, the Rule, should be placed somewhere, it natu-

22. Linda Nicholson, *Gender and History: The Limits of Social Theory in the Age of the Family* 133-66 (1986).

23. Sir Robert Filmer, *Patriarcha and other political works* (Peter Laslett ed. 1949).

24. Locke, *supra* note 20, at 321 (II, Chap. VI, § 52).

25. See *The Sexism of Social and Political Theory: Women and Reproduction from Plato to Nietzsche* 16-40 (Lorenne Clark & Lynda Lange ed. 1979); Melissa Butler, *Early Liberal Roots of Feminism: John Locke and the Attack on Patriarchy*, 72 *Am. Pol. Sci. Rev.* 135 (1979); R.W.K. Hinton, *Husbands, Fathers and Conquerors: I*, 15 *Pol. Stud.* 291 (1967); and R.W.K. Hinton, *Husbands, Fathers and Conquerors: II*, 16 *Pol. Stud.* 55 (1968).

26. Locke, *supra* note 20, at 337 (II, Chap. VII, §§ 77-78).

27. *Id.* at 339 (II, Chap. VII, § 82).

rally falls to the Man's share, as the abler and the stronger."²⁸

Accordingly, Locke, whose contract theory of government forms the foundation of our own Constitution and the English parliamentary settlement of 1689, insisted that the public realm of equal rights and equal participation in government belonged properly to men alone.²⁹ Women's realm was inferior and private; the traditional family hierarchy thus remained intact. John Adams was therefore being a good Lockean when he quickly dismissed his wife Abigail's objections to the dependent status of married women under the common law.

To say that American men of the revolutionary generation subscribed to Locke's views on the proper role of women in a government based on the contract theory is not, however, to say that their womenfolk agreed with them. Men may have wanted to deny women a place in the public realm, but just as Abigail Adams drew inspiration from revolutionary ideology, so too did other of her female compatriots. Indeed, when the women of New Jersey unexpectedly gained the opportunity to vote in the 1790s, they exercised that right with enthusiasm and pleasure.³⁰ Examining their actions provides us with a chance to see the contemporary implementation of an alternative to strictly Lockean politics.

New Jersey's little-known experiment with woman suffrage began when the members of the state constitutional convention in 1776 vaguely defined voters as "all free inhabitants" who met certain property qualifications. Given the Lockean universe in which the men were operating, it is obvious that they so unquestioningly defined the political world as male that they simply forgot to insert a masculine modifier into the crucial suffrage clause. Their oversight allowed the women of New Jersey to seize the initiative, and so widows and never-married women who owned sufficient property successfully claimed the right to vote in the 1780s and 1790s.³¹

One well-documented election in which women played a prominent role was the heated contest in 1797 over the legislative seat for the town of Elizabeth. Reportedly, seventy-five female Federalists appeared at the polls to vote against the Democratic-Republican candidate, John Conduct. Although Conduct won, Federalist newspapers celebrated the women's activism.³² One even

28. *Id.*

29. *Id.* at 341-48 (II, Chap. VII, §§ 87-94).

30. Mary Beth Norton, *Liberty's Daughters: The Revolutionary Experience of American Women, 1750-1800*, at 191 (1980).

31. *Id.*

32. *Id.* at 191-92.

published a poem, which read, in part:

Let Democrats with senseless prate,
 maintain the softer Sex, Sir,
 Should ne'er with politics of State
 their gentle minds perplex Sir:
 Such vulgar prejudice we scorn;
 their sex is not objection
 While woman's bound, man can't be free,
 nor have a fair election.³³

Yet not all male New Jerseyites greeted woman suffrage with such exuberant glee. In his 1798 commentary on the state constitution William Griffith found it a "mockery," even "perfectly disgusting," to watch female voters casting their ballots. "It is evident, that women, generally, are neither, by nature, nor habit, nor education, nor by their necessary condition in society, fitted to perform this duty with credit to themselves, or advantage to the public," he asserted.³⁴ In 1807, relying on the persistence of such attitudes, John Condict took his revenge for his near-defeat by women ten years earlier: he introduced the bill that successfully disfranchised both women and property-owning free blacks, arguing that the votes of such persons were more likely to be corrupted than were those of independent white males.³⁵

What the New Jersey episode tells us is not merely that women and men frequently differ in their assessments of what women can and cannot—or should and should not—do. It also reveals that at the very inception of American government based on a Lockean model women objected to being excluded from the political community, seeking to end that exclusion and to take their places alongside their male counterparts through participating in voting, if not yet in running for office.

The broader context of Lockean thought explains why New Jersey's constitution-drafters omitted the word "male" from their document and indeed why the Founding Fathers used "person" rather than "man" in Philadelphia in 1787. To men of the late eighteenth century, the world of politics was so clearly exclusively *male* that masculine defining terms were unnecessary. It never even crossed their minds that women might want to be included in politics some day, or that "women's rights" might eventually be-

33. Centinel of Freedom (Newark, N.J.), Oct. 18, 1797, quoted in Norton, *supra* note 30, at 354 n.70.

34. William Griffith, Eumenes, Being a Collection of Papers 33 (1799); and *Friend to the Ladies*, True American (Trenton, N.J.), Oct. 18, 1802, quoted and cited in Norton, *supra* note 30, at 354 n.71.

35. E.R. Turner, *Women's Suffrage*, 1 Smith C. Stud. Hist. 181-85 (1916), cited in Norton, *supra* note 30, at 354 n.72.

come an issue.³⁶

What, then, do these gendered origins of the American polity imply for persons like yourselves, who are concerned with the enforcement of federal law and the applicability of the Constitution today?

First, they show us why it has been much more difficult for women than for blacks—half of whom, after all, are *males*—to be written into constitutional protections, whether via formal amendments or through Supreme Court decisions. The reluctance of the Supreme Court to apply standards of “strict scrutiny” to sex-based classifications rests ultimately on the fact that the Constitution not only omitted all explicit reference to women, it also was drafted as though they did not exist as political individuals—for indeed they did *not* in the minds of the Founding Fathers. Slaves and Indians at least received some mention in the text of the Constitution, brief though the references were; and those clauses—as subsequently amended, in the case of blacks—later formed the basis for the expansion of the rights of minority groups. But women had to wait until the adoption of the nineteenth amendment in 1920 to be formally incorporated into the American political community. Ironically, though, the use of the word “male” in certain clauses of the fourteenth amendment alerts us to the fact that as early as the mid-nineteenth century the inclusion of women in politics was no longer unthinkable.

Second, this analysis of the gendered assumptions of the men of the revolutionary generation raises directly and unavoidably the issue of the relationship of the “original intent” of the Founding Fathers to the United States we live in two hundred years later. Should we allow the political definitions and assumptions of not just the eighteenth, but the *seventeenth* century, with all their obvious anachronistic shortcomings and status-laden implications, to determine our Constitutional interpretations today? As a historian and a feminist, I think the answer is no, but you will all have to reach your own conclusions on that point.

36. I have discussed this point in greater depth in *Freedom of Expression as a Gendered Phenomenon*, in *The Constitution, The Law, and Freedom of Expression 1787-1987*, at 42-64 (James Stewart ed. 1988).

